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Supreme Court of the United States

OCTOBER TERM, 1952

No. 563

JOINT ANTI-FASCIST REFUGEE COMMITTEE

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC., ET AL.

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners pray that a writ of certiorari issue to bring to this Court two cases pending in the United States Court of Appeals for the District of Columbia Circuit wherein the petitioners have on appeal judgments of the United States District Court for the District of Columbia denying plaintiffs' motions for preliminary injunction. (R. 58-59, 96-97).

OPINION BELOW

A single opinion was filed by the District Court (Morris, J.) in both of these cases, as well as in a companion case, *International Workers Order Inc.* v. *McGrath.* It is reported sub nom *Joint Anti-Fascist Refugee Committee* v. *McGrath,* at 104 F. Supp. 567. (R. 49-58).

SUMMARY STATEMENT OF MATTER INVOLVED

In November 1947, the Attorney General designated the complaining organizations on a list of subversive organizations purportedly made pursuant to Executive Order 9835. (R. 27-32). The petitioners filed actions seeking injunctions and declaratory judgments alleging that the action of the Attorney General was invalid. (R. 1-9, 60-73).

The respondents filed no answers to the complaint but filed instead motions to dismiss. These motions were granted by the District Court on the ground that the petitioners had not suffered any legal injury from the listing and therefore lacked standing to sue. (R. 12-13). The rulings of the District Court were subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.[1]

On writs of certiorari, this Court reversed the lower courts, holding that the petitioners had standing to sue and that the dismissals of the complaints were erroneous. The decision was by a divided court, five to three, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. Four of the majority justices expressly stated that the listing of the petitioning organizations by the Attorney General in the absence of adequate notice and hearing was invalid and unconstitutional. Justice Burton, although acknowledging that the case bristled with important con-

[1] The Joint Anti-Fascist Refugee Committee case was affirmed in *Joint Anti-Fascist Refugee Committee* v. *Clark,* 177 F (2d) 79. The National Council of American-Soviet Friedship case was affirmed without opinion, the Court relying on its opinion in the Joint Anti-Fascist case, *supra.*

stitutional issues (at 135), found it unnecessary to decide this issue on the state of the pleadings then before the Court, since the case had come upon a dismissal of the complaints and the government had not yet filed its answers. The three dissenting justices also did not reach this question since they agreed with the lower courts that the petitioners had no standing to sue.

Upon remand to the District Court, respondents filed their answers to the complaints. (R. 13-18, 73-81). The two answers are virtually identical. They admit that the listing of the organizations was done without any form of notice or hearing, but allege that the designations were made "after careful study" "on the basis of information in his [the Attorney General's] possession, including confidential investigative reports of the Federal Bureau of Investigation." (R. 16, 78-79). Other than this recital, the answers contain no factual allegations as to the basis upon which the designations were made. Moreover, despite the allegations of "careful study," the answers profess a complete lack of knowledge as to the character and activities of the petitioning organizations as set forth in the respective complaints. Thus, the answers plead a lack of knowledge as to the dates on which the petitioning organizations were formed, their purposes and aims, the nature of the material which they printed and circulated, the character of their meetings, and the individuals and public officials who participated in and addressed their functions. (R. 14-15, 74-80).

The petitioners thereupon filed motions for judgment on the pleadings, for summary judgment, and for preliminary injunction. (R. 34-35, 51, 82). In the case of the Joint Anti-Fascist Refugee Committee, the motion for preliminary injunction was a renewal of a motion filed at the time of originally filing its complaint, which motion was denied when the complaint was dismissed. (R. 10-13). In support of the motions for preliminary injunction and for summary judgment the petitioners filed affidavits substantiating in

detail all of the allegations of the complaints (R. 35-38, 83-89).

The respondents' opposition to these motions rested primarily upon the affidavits of the then Attorney General, J. Howard McGrath. (R. 39-44, 90-96). The affidavits, in each case, like the answers of the respondents, state that the designations of the petitioning organizations were made on the "basis of information in his [the Attorney General's] possession, including confidential investigative reports of the Federal Bureau of Investigation." (R. 40, 91). The affidavits then recite as follows: (emphasis supplied).

> "Much of the evidence and information upon which this designation rests is derived from confidential reports of investigations conducted by the Federal Bureau of Investigation. *Public policy and national security will not permit the disclosure of the contents of many confidential reports nor the presentation by way of testimony through witnesses of any of the confidential information contained in such reports* since such revelations would be detrimental to the national security and would render valueless for future use confidential sources of information essential to the protection of our national security.
>
> "Within the limits of national security, however, I submit the following summary of information upon which, in part, the designation of the . . . [petitioning organizations], pursuant to Section 3 Part III of Executive Order 9835, is based. This summary does not reflect the complete factual basis upon which the determination rests but only that part which can be disclosed . . . ." (R. 40-41, 91-92).

The affidavit in each case then sets forth in summary form allegations that the petitioning organizations were organized and controlled by the Communist Party. (R. 42-44, 93-94).

The respondents also filed in opposition to the motions for preliminary injunction an affidavit by Hiram Bingham, Chairman of the Loyalty Review Board, which alleged that granting of petitioners' motions for preliminary injunction would interfere with the administration of the government's loyalty program. (R. 45-48).

Petitioners moved to strike the affidavits of J. Howard McGrath on the ground that the affidavits did not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure that, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," and that "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." (R. 53-54).

After argument, the District Court filed an opinion on April 23, 1952, 104 F. Supp. 567. (R. 49-58). The court denied the motions of petitioners and respondents for summary judgment or judgment on the pleadings and also denied petitioners' motions for preliminary injunction. (R. 58-59, 96-97). In his opinion, the District judge acknowledged that on the pleadings before him it was conceded that the designation of the petitioning organizations had been made without notice and hearing. He refused, however, to determine whether or not such designation without notice and hearing rendered the action invalid and entitled petitioning organizations to relief. Thus, although he denied petitioners' motion for judgment on the pleadings, he reached this result by refusing to decide the question presented. According to the District Court the matter of whether or not notice or hearing was required before designation could validly be made was required to await a trial, although obviously a trial could not alter the undisputed fact that the organizations had been denied any opportunity for notice and hearing. In addition, the District Court, although reciting that petitioners had filed motions to strike the affidavits of J. Howard McGrath as insufficient under the rules, refused entirely to pass upon these motions. Nevertheless, the court referred to the affidavits in its opinion, and on the basis of the affidavits denied petitioners' motions for summary judgment.

The District Court recognized that the form of the affidavits by J. Howard McGrath posed the question as to whether or not the government could justify its listing solely on the basis of the Attorney General's statement that he had information in his possession which would support such a listing or whether in any event the government must at some stage support that designation by admissible evidence. The affidavits' professions of the inability of the government to present evidence because of the interests of national security, leaves a fair inference, and one which the government has never disclaimed, that it does not intend at any stage of this proceeding to support its designation by admissible evidence. Although recognizing that this question was posed by the pleadings and the affidavits on file, the court refused to resolve the question, suggesting that it too could be resolved at some future stage.

Thus the District Court refused to decide whether on the admitted facts petitioners were entitled to judgment, informed petitioners that they must await a trial before they could obtain a decision on facts which a trial would not change, and concluded that it did not know what issues would be resolved at such a trial.

Finally, the District Court denied petitioners' motions for preliminary injunction on the ground that the injury which the respondents' action had done to the petitioners, as recognized by this Court, had already taken place; and that whether or not the action of the respondents were illegal, an injunction against such actions "would . . . bring about a change in governmental procedures which had been in operation for a long period, and which ought not to be altered unless and until it is determined that the action in question is illegal and invalid." (at p. 572). (R. 58). In short, according to the District Court, petitioners would not be entitled to relief until and unless the respondents' acts were determined to be illegal and invalid. However, the District Court refused to exercise its judicial function to determine whether or not this action was invalid, in-

sisting that petitioners must first go to trial on issues which bore no relevance to a decision on this question and which the court was unable to define or delineate.

The petitioners noted an appeal from the District Court's denial of the motions for a preliminary injunction and docketed that appeal in the United States Court of Appeals for the District of Columbia Circuit on October 29, 1952.

On ~~March~~ November 7, 1952, the Court of Appeals entered orders substituting James P. McGranery as respondent in the place and stead of J. Howard McGrath (R. 100-101).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, sec. 1254(1).

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12F. R. 1935, issued March 21, 1947 appears in the record at pp. 18-26.

QUESTIONS PRESENTED

(1) Whether the action of the Attorney General in designating without notice and hearing, petitioning organizations as "subversive" organizations for the purposes of Executive Order 9835 violates the First and Fifth Amendments.

(2) Whether the denial of the plaintiffs' motions for a preliminary injunction was an abuse of discretion where on the admitted facts the plaintiffs were entitled to relief as a matter of law, and whether the trial court's refusal to pass upon an issue of law posed by undisputed facts constituted an abuse of discretion.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Issues

This court has already determined that the issues posed by this case are important ones requiring consideration and adjudication by this Court. The issues have already been argued and considered by this Court. Unfortunately, because of the state of the pleadings when these issues were earlier before this court, the decision of this court did not definitely adjudicate the case. *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.*

In its prior decision, four justices stated unequivocally that the denial by the Attorney General of a notice and hearing to the petitioning organizations rendered the listing invalid. One justice, Justice Burton, although recognizing the importance of the issue, held that he did not have to pass upon the constitutional issue posed in this petition because the pleadings had not at that time been closed. The government has now filed its answers admitting the denial of notice and hearing and the issue is ripe for adjudication.

II. The Trial Court Abused its Discretion

The trial court clearly abused its discretion. On the admitted facts before it, the trial court was required to decide the issue as to whether the Attorney General's denial of notice and hearing invalidated the listing. The trial court refused to pass upon this question at all, and relegated the petitioners to a trial which could in no way alter the admitted facts.

The trial court, moreover, although ignoring the legal issue before it which required adjudication on undisputed facts, denied the petitioners' requests for a preliminary injunction. It did this on the ground that after balancing the equities, it found that the public interest in the continued operation of the list by the government, outweighed the damage done to the petitioners. But if the action of the government which is challenged is, on the undisputed

facts, clearly illegal and unconstitutional, then there are no equities to be balanced, since there can be no overriding public interest in protecting the continuance of such illegal action. See Frankfurter, J. concurring in *Youngstown Sheet and Tube Co.* v. *Sawyer.* 343 U.S. 579, 596. If the petitioners were entitled to judgment on the pleadings as they stand, then there could be no conceivable equities which would justify a denial of a preliminary injunction.

The error was magnified, moreover, by the fact that there are no issues to go to trial. Presumably, a preliminary injunction should be denied only where it appears that a trial might result in a judgment for defendant. On the face of the government's affidavits, it appears that the government does not intend at any stage to introduce admissible evidence which would support the listing. The only question to be determined, therefore, is whether the affidavits would justify judgment for the government. The trial court recognized that this question was posed by the affidavits, but, in a mood of complete abdication of the judicial function refused to pass upon this question as well. Thus, as the case stands, not only would a trial not alter the undisputed facts that the Attorney General denied the petitioners notice and hearing, but there do not appear to be any issues at all which would be litigated at a trial.

The climax of the trial court's errors was reached in its holding that in balancing equities the damage inflicted, and still being inflicted, upon the petitioners by the illegal action of the Attorney General should be discounted because this damage had already been incurred for a number of years. But this damage had already been incurred for this period only because of the originally erroneous action of the District Court in dismissing the petitioners' complaints, an action which was reversed by this Court on review. Thus according to the District Court, damage incurred because of the District Court's denial to the petitioners of the relief to which they are entitled serves as a justification for a continued denial of such relief.

III. Why the Issues Should be Reviewed in This Case Prior to Decision of the Court of Appeals

In the *Joint Anti-Fascist case, supra,* Justice Burton, speaking for himself and Justice Douglas, said that the effect of the Attorney General's listing of the petitioning organizations was to "cripple the functioning and damage the reputation of those organizations" (at 139). Justice Black said that the "Attorney General's much publicized findings, . . . are the practical equivalents of confiscation and death sentences for any blacklisted organization" (at 142). Justice Frankfurter said (at 159), "Designation works an immediate substantial harm to the reputations of petitioners," and (at 161) "It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organization, if it does not proscribe them." Justice Douglas for himself said (at 175): "An organization branded as 'subversive' by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable." The dissenting justices, although denying that the petitioners were entitled to any legal redress, stated that they recognized that the designation of the petitioning organizations "impairs their ability to carry forward successfully whatever legitimate objects they seek to accomplish" (at 200).

The petitioning organizations instituted legal action in an effort to obtain redress for the severe and crippling damages inflicted upon them by the designation. At the outset they were met with a ruling by the District Court that they were not even entitled to access to the courts. The Court of Appeals for the District of Columbia affirmed, and the petitioners were compelled to come to this Court to obtain a ruling that they were even entitled to sue.

Upon remand to the District Court, the government filed answers in which it in effect conceded the essential allegation in the complaints of the petitioners, but insisted that it has a right to designate the petitioning organizations

without notice and hearing on the basis of confidential investigative reports of the Federal Bureau of Investigation. The District Court again denied the petitioners relief, refusing to decide either for or against the petitioners any of the legal issues presented by the pleadings and affidavits on file. Its course of action in effect amounted to an abdication of its judicial function in favor of a program of delay and continued frustration of the petitioners' rights. To climax its action, the District Court held that the petitioners were not entitled to relief at this stage because they have not been able to obtain such relief heretofore. Obviously, elementary justice and the severe damage the petitioners have incurred pending the delays of litigation accompanying one set of appeals to this Court require that the petitioners obtain their relief in less tortuous fashion. It is almost as if the actions of the lower courts were designed to wear the petitioners out with a view toward their complete destruction so as to prevent by a process of attrition their ever obtaining a final adjudication of their rights.

No useful purpose would be served and much harm would be done the petitioners by subjecting them to the further delays of an appeal to the Court of Appeals. This Court has already considered the issues involved in this petition. Four justices have already spoken on the question. Nor are there any factual questions which require analysis and determination. Under these circumstances, intermediate consideration of the issues by the Court of Appeals would be of no value as a guide to this Court. Moreover, the Court of Appeals for the District of Columbia has already expressed its views on the subject in this very case, *Joint Anti-Fascist Refugee Committee* v. *Clark*, 177 F (2d) 79, and has recently indicated, that even after considering this Court's opinion in the *Joint Anti-Fascist* case, it still adheres to those views ex-

pressed earlier. See *Kutcher* v. *Gray,* 199 F (2d) 783, 789, fn. 25.[2]

Until this Court determines the issues in these cases, the harm to petitioners is continuing in an aggravated degree. Not only is the list still being employed in the government's loyalty program, but it is increasingly being used as a general black-list, to the injury of the petitioners. Among the most notable of these instances have been its use as a test for state employment (see *Wieman* v. *Updegraff,* (— U.S. —, 97 L. ed. 162); its use as a condition for the occupancy of public housing (Independent Offices Appropriation Act, 1953, P. L. 455, c. 578, 82nd Cong., 2d Sess., sub title Public Housing Administration); its use as a condition for granting a commission in the armed services *Orloff* v. *Willoughby,* No. 444, this term); and its use as a basis to exclude aliens (*U. S. ex rel. Mezei* v. *Shaughnessy,* 195 F. 2d 964; *Shaughnessy* v. *Mezei,* No. 139, this term) and to deny discretionary relief from deportation (*U. S. ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489).

Under these circumstances, to require the petitioners once again to prosecute their appeals through the Court of Appeals would serve no purpose other than to continue the damage already done to the petitioners and further delay any effective relief.

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[2] The Court of Appeals for the Second Circuit has expressed the contrary view. The Second Circuit is of the view that this Court in fact invalidated the listing of "subversive" organizations in the *Joint Anti-Fascist* case. See *United States ex rel. Mezei* v. *Shaughnessy,* 195 F (2d) 964, 967.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 563

JOINT ANTI-FASCIST REFUGEE COMMITTEE, NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC., ET AL., PETITIONERS

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

A single opinion was filed by the United States District Court for the District of Columbia for both these cases and a companion case, *International Workers Order, Inc.* v. *McGrath et al* (R. 49-58). It is reported at 104 F. Supp. 567.

JURISDICTION

The judgments of the District Court were entered on July 2, 1952 (R. 58, 96). On July 31, 1952, notices of appeal were filed (Tr. 112, 172). By orders of the District Court dated September 3, 1952 (Tr. 113, R. 97), and October 15, 1952 (Tr. 116, R. 99), the time for filing the records on appeal and docketing the appeals was extended to and including October 29, 1952. On October 29, 1952, petitioners docketed their appeals with the Court of Appeals for the District of Columbia Circuit. The cases have not been submitted to, heard or decided by the Court of Appeals (R. 103). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon remand of these cases to the District Court after this Court's decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, and the filing of answers and affidavits by the Attorney General, the District Court erred in holding that the pleadings raised issues of fact for trial and abused its discretion in denying petitioners' motions for a preliminary injunction.

EXECUTIVE ORDER INVOLVED

The text of Executive Order 9835, 12 F. R. 1935, is set forth in the record at pp. 18-26.

STATEMENT

These are actions attacking the validity of Executive Order 9835, issued on March 21, 1947, which

established the President's Employees Loyalty Program in the Executive Branch of the Government. In November, 1947, the Attorney General furnished the Chairman of the Loyalty Review Board of the Civil Service Commission with a list of organizations and groups determined by him to fall within the description of Part III, Section 3, of the Executive Order (R. 27). Petitioners were included in this list as "subversive" (R. 30). In December, 1947, the Chairman of the Loyalty Review Board transmitted a copy of the Attorney General's list to the various departments and agencies pursuant to Part III, Section 3a, of the Executive Order (R. 32). In September, 1948, the Attorney General divided the listed organizations into the separate categories named in the Executive Order, and petitioners were designated as "communist" organizations. This, too, was transmitted by the Chairman of the Loyalty Review Board. 13 F. R. 1635.

In February and June, 1948, petitioners instituted these proceedings in the District Court for the District of Columbia to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board, from designating and publicizing the names of petitioners as "communist" organizations, to direct respondents to remove petitioners' names from the list, to make a public statement of this removal, and to take no action based on the inclusion of their names in the list of designated "communist" organizations.

Petitioners further prayed for a declaratory judgment that the Executive Order is unconstitutional. (R. 1-9, 60-73.)

Respondents, in turn, moved to dismiss the complaints for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (Record in No. 7, October Term, 1950, p. 17; Record in No. 8, October Term, 1950, p. 28). In June, 1948, the district court dismissed the complaint in the *Refugee Committee* case and denied the motion for a preliminary injunction (Record in No. 8, October Term, 1950, pp. 28-29). In February, 1949, the complaint in the *National Council* case was similarly dismissed (Record in No. 7, October Term, 1950, p. 19).

The Court of Appeals for the District of Columbia Circuit affirmed. 177 F. 2d 79.[1] (Record in No. 8, October Term, 1950, p. 49; Record in No. 7, October Term, 1950, p. 20.) A petition for rehearing in the *Refugee Committee* case was denied in September, 1949 (Record in No. 8, October Term, 1950, p. 51).

On April 30, 1951, this Court reversed and remanded the cases to the district court with instructions to deny the respondents' motions that the complaints be dismissed for failure to state a claim upon which relief can be granted. *Joint*

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[1] The *National Council* case was affirmed *per curiam* in an unreported opinion, which relied on the decision in the *Refugee Committee* case.

Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123, 142. Five members of the Court concurred in the judgment, but no opinion of the Court was announced. Three justices dissented, and one took no part.

All of the majority of the Court were of the view that on the pleadings before the Court, the complaints stated a cause of action. Only four of the majority justices, however, reached the constitutional questions presented. Justices Black, Frankfurter, Douglas and Jackson expressed the view that the designation by the Attorney General of petitioners as "communist" organizations would be unconstitutional in the absence of adequate notice and hearing (341 U. S. at 143, 172-174, 177-178, 186). Suggesting that the Executive Order itself is not invalid on this score, Mr. Justice Frankfurter further stated that nothing in the Executive Order requires the Attorney General to deny organizations an opportunity to present their case (341 U. S. at 172).

The fifth majority justice found it unnecessary to reach the constitutional issues on the state of the pleadings then before the Court. In an opinion in which Mr. Justice Douglas joined, Mr. Justice Burton stated that the issue was whether, in the face of the facts alleged in the complaints and therefore admitted by the motions to dismiss, the Attorney General was authorized by the Executive Order to designate petitioners as "communist" organizations (341 U. S. at 124-125). Reading the Executive Order as containing no express or im-

plied attempt to confer power on anyone to act arbitrarily or capriciously, Mr. Justice Burton declared that the action taken by the Attorney General was unauthorized by the Executive Order in light of the allegations in the complaints of an absence of any factual basis for the designations (341 U. S. at 136-138). In conclusion, he stated that (*id.* at 141-142):

> We have assumed that the designations made by the Attorney General are arbitrary because we are compelled to make that assumption by his motions to dismiss the complaints. Whether the complaining organizations are in fact communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await determination by the District Court upon remand.

Petitioners did not file a petition for rehearing or for clarification of the mandate. Upon remand to the district court, respondents filed their answers to the complaint on August 23, 1951 (R. 13-18, 73-81). The answers admit that petitioners did not receive any notice or hearing with respect to their designation by the Attorney General as "communist" organizations. With respect to petitioners' allegations as to the nature of their activities, the answers allege that respondents are without knowledge or information sufficient to form a belief as to the truth of such allegations and aver, upon information and belief, that such allegations "do not constitute a statement com-

plete in every material respect as to the nature, policy, and activities" of the petitioners (R. 14-15, 76-78).

On December 12, 1951, petitioners filed motions for judgment on the pleadings or, in the alternative, for summary judgment, and for a preliminary injunction, based upon the pleadings, the affidavits previously filed, and the affidavits submitted therewith (R. 34-35, 51, 82). In turn, respondents moved for summary judgment, based upon the pleadings and the affidavits of the then Attorney General, J. Howard McGrath (R. 51, 39-44, 90-96). The Attorney General's affidavits were also offered in opposition to petitioners' motions, as was an affidavit of Hiram Bingham, Chairman of the Loyalty Review Board (see *infra,* pp. 13-14, n. 2) (R. 39, 45, 90).

The affidavits of the Attorney General each recite that petitioners were designated as "communist" organizations by the then Attorney General, Tom C. Clark, acting under authority of the Executive Order, "after appropriate investigation and determination * * * on the basis of information in his possession, including confidential investigative reports of the Federal Bureau of Investigation, memoranda prepared by attorneys of the Department, and upon the recommendation of the Solicitor General, the Assistant Attorneys General, and the Assistant Solicitor General, and a careful study of all * * *" (R. 40, 91). In his capacity as Attorney General of the United States,

Mr. McGrath stated that he was affirming and continuing such designations (R. 40, 91).

The affidavits in each case then recite as follows (R. 40-41, 91-92):

> Much of the evidence and information upon which this designation rests is derived from confidential reports of investigation conducted by the Federal Bureau of Investigation. Public policy and national security will not permit the disclosure of the contents of many confidential reports nor the presentation by way of testimony through witnesses of any of the confidential information contained in such reports, since such revelation would be detrimental to the national security and would render valueless for future use confidential sources of information essential to the protection of our national security.
>
> Within the limits of national security, however, I submit the following summary of information upon which, in part, the designation of [petitioners], pursuant to Section 3, Part III of Executive Order 9835, is based. This summary does not reflect the complete factual basis upon which the determination rests but only that part which can be disclosed without jeopardizing the national security. Such information is offered to satisfy the court that this designation was not arbitrary, capricious, or without foundation in fact.

Continuing, each affidavit contains certain statements concerning the character of the Communist Party of the United States, its objectives

and methods of operation (R. 41-42, 92-93). Thereafter, each affidavit sets forth, to the extent permitted by considerations of national security, the information with respect to each petitioner upon which the Attorney General made his determinations.

With respect to the Refugee Committee, the affidavit states that the Committee was organized by order of the Communist Party; that the Communist Party delegated one of its members to supervise the funds of the Committee; that the National Chairman and other officers of the Committee were chosen by the Communist Party; that reports of the Committee were made to the National Committee of the Communist Party; that a substantial number of the officers of the Committee, including members of its National Board of Directors, as well as its other national and local officers, were members of the Communist Party; and that the Committee was run by the Political Committee of the Communist Party, specifically through Eugene Dennis and Jack Stachel (R. 42-43).

Further, that the Communist Party has contributed money to the Committee and to activities sponsored by the Committee; that the Committee has received full support from the official publications of the Communist Party; that the Committee has never deviated from the policies advanced and espoused by the Communist Party; that the ostensible purpose of the Committee to aid individuals who fought for the Spanish Republican Government is but a front, behind which the Com-

mittee supported and assisted, in the guise of refugees from fascist persecution, secret agents of the Government of the Soviet Union; and that the Committee was organized by the Communist Party with the real, specific and undisclosed purpose of bringing such agents into the United States—*e. g.* Gerhart Eisler—and supporting them during their stay here, while they assisted in supervising the subversive activities of the Communist Party (R. 43-44).

With respect to the National Council, the affidavit recites that the Council was organized under the direction of the Communist Party after the subject of forming such an organization had been discussed at meetings of the Politburo and the National Committee of the Communist Party; that the Politburo of the Communist Party appointed the officers of the Council; that the Political Committee of the Communist Party ran the activities of the Council; that the executive officers of the Council were members of the Communist Party; that the Council sought advice and instructions from the Politburo of the Communist Party; and that its decisions regarding the Council were strictly complied with by the Council (R. 93, 94).

Further, that the financial affairs of the Council were supervised by the Communist Party; that the Communist Party gave financial aid and other support to the Council; that through its meetings, publications, rallies, and other functions, the Council gave aid and support to the Communist Party; that the Council sent personnel to Communist Party Headquarters to help address letters

and to aid in the mailing of material; that throughout its existence, the Council has never knowingly deviated from the views and policies of the Communist Party; and that whenever such views and policies have conflicted with the position taken by the government of the United States, the Council has opposed the position of the United States (R. 94-95).

Petitioners then moved to strike the Attorney General's affidavits on the ground that the affidavits did not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein", and that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith" (R. 53-54).

After a hearing, the district court filed an opinion on April 23, 1952 (R. 49-58). Denying respondents' motions for summary judgment, the court held that the question whether the Attorney General's designations were reasonable in the light of the information then possessed by him could not be decided on motion for summary judgment. The district court stated that this issue could properly be resolved only by receiving evidence concerning the factual matters upon which the Attorney General based his action and by determining whether, in the light of such evidence, there was a reasonable basis for his action. (R. 56.) Continuing, the dis-

trict court observed that "the affidavit filed by the Attorney General, stating, as it does, factual matters which he believed to be true, and which, if true, would undoubtedly justify the conclusion which was reached, might well be treated as an amendment to his answer to the end that all permissible and all admissible data relating to such factual matters could be considered by the Court" (R. 56-57).

On the same reasoning, the district court denied petitioners' motions for judgment on the pleadings, or in the alternative, for summary judgment. Declining to pass upon petitioners' argument that the action taken by the Attorney General is invalid, regardless of the factual basis which he had for taking such action, in the absence of adequate notice and hearing to petitioners (R. 57), the district court pointed out that this view had not been adopted by the majority of this Court and that "that question was left * * * for consideration in the light of the action which might be taken by [the district court] after it had examined into and determined the factual basis upon which the designations complained of were made by the Attorney General" (R. 57). Stating that "with respect to the admitted fact that there was no adequate notice or hearing, the cases are now in precisely the same posture that they were when considered by the Supreme Court * * * [which] did not see fit to deal with that question then," the district court declared that it saw no reason why the court "should deal with it now before it has had opportunity to examine into the factual basis upon which the

designations complained of were made" (R. 57).

Petitioners' motions for a preliminary injunction were also denied. In this connection, the district court stated that (R. 57-58):

> * * * it must be considered that the designations complained of, and concerning which plaintiffs claim that irreparable injury threatens, occurred in the year 1947. From the assertions made by plaintiffs, they have already suffered substantially all of the injury which they claim resulted from the action, the legality of which is to be in these cases determined. It does not appear that injunctive relief, if now granted, would, or could, afford to them the protection which injunctive relief is ordinarily intended to afford, and it does appear that at this late date, substantially five years after the action complained of, its effect would be to bring about a change in governmental procedures which have been in operation for a long period, and which ought not to be altered unless and until it is determined that the action in question is illegal and invalid. Balancing the equities of the parties and the public interest, I must conclude that the motions for injunctive relief *pendente lite* should be denied.[2]

On July 2, 1952, the district court entered its judgment in each case denying petitioners' motions for judgment on the pleadings, for summary

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[2] As noted above, p. 7, respondents also offered the affidavit of Hiram Bingham, Chairman of the Loyalty Review Board, in opposition to petitioners' motions for a preliminary injunction. The affidavit states that the removal of petitioners' names from the list of designated organizations *pendente lite*

judgment, and for a preliminary injunction, and denying respondents' motion for summary judgment (R. 58-96). On July 31, 1952, notices of appeal were filed (Tr. 112, 172). On October 29, 1952, petitioners docketed their appeals with the Court of Appeals for the District of Columbia Circuit,[3] and on January 23, 1953, filed their petition for certiorari. The cases have not been sub-

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would result in irreparable injury to the public interest. In brief, the affidavit recites that the Attorney General's list provides a uniform guide for the adjudication of loyalty cases by more than 200 Agency Loyalty Boards and 14 Civil Service Commission Regional Loyalty Boards; that the Agency Loyalty Boards have adjudicated 4,657 cases as of November 30, 1951, the Regional Loyalty Boards have adjudicated 5,492 cases as of December 8, 1951, and that the Loyalty Review Board has heard on appeal 334 cases and has post-audited some 11,000 cases as of December 30, 1951; that the successful operation of the Federal Employees' Loyalty Program depends upon the existence of a single and uniform guide as to the character of given organizations; and that none of the Loyalty Boards has facilities for making investigations on its own account to determine whether a given organization is within the classification set forth in the Executive Order (R. 46-47). The affidavit further recites that the removal of an individual organization from the Attorney General's list *pendente lite* would have an incalculably damaging effect on past, present, and future determinations under the Executive Order. To do so would mean that decisions in all cases involving membership or activities in such organization would have to be held in abeyance pending final judicial determination of the legality of the designation. As a result, there would remain on the Federal rolls for an indefinite period individuals who otherwise should be removed, applicants who are members of or active in any such organization would be entitled to employment even though such employment might constitute a grave hazard to national security, and adjudicated cases would be subject to petitions for reopening. (R. 48.)

[3] By orders of the district court dated September 3, 1952 (Tr. 113, R. 97), and October 15, 1952 (Tr. 116, R. 99), the time for filing the records on appeal and docketing the appeals was extended to and including October 29, 1952.

mitted to, heard or decided by the court of appeals (R. 103).

Subsequent to the date on which the district court delivered its opinion, but prior to the date on which judgments were entered, J. Howard McGrath was succeeded by James P. McGranery as Attorney General. On June 12, 1952, counsel for petitioners wrote Attorney General McGranery inquiring whether he intended to affirm and continue the designations made by his predecessor of petitioners as "communist" organizations pursuant to the Executve Order. After due consideration, Attorney General McGranery advised petitioners' counsel that he did affirm and continue such designations and, with his consent, orders were entered by the court of appeals on November 7, 1952, substituting James P. McGranery as respondent in the place and stead of J. Howard McGrath (R. 100-101).

On January 21, 1953, James P. McGranery was succeeded by Herbert Brownell, Jr., as Attorney General.

ARGUMENT

In advance of any hearing in the court below, petitioners have applied to this Court for a writ of certiorari before judgment to review the district court's denial of petitioners' motions for preliminary injunctions.[4] Petitioners argue that "no use-

[4] Since the denial of the motions for judgment on the pleadings or, in the alternative, for summary judgment are not final orders, the only reviewable orders are the denials of the motions for a preliminary injunction.

ful purpose would be served and much harm would be done the petitioners by subjecting them to the further delays of an appeal to the Court of Appeals" (Pet., p. 11).

In our view, these cases, in their present posture, do not present the exceptional and extraordinary circumstances which would justify the granting of certiorari before consideration of the cases by the court of appeals. Not only is the granting of certiorari before judgment "a power not ordinarily to be exercised" (see *The Three Friends*, 166 U. S. 1, 49; cf. *United States* v. *Montgomery Ward & Co.*, 324 U. S. 858; *United Steelworkers of America, CIO, et al.* v. *United States, et al.*, No. 523, this Term, certiorari denied, January 5, 1953), but this Court has generally been reluctant to grant certiorari simply to determine whether the trial court abused its discretion in denying an interlocutory injunction (see Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 ed.), p. 671, n. 8). Petitioners to the contrary, the issue at this stage of the proceedings, as we shall show, is not whether the action of the Attorney General under Executive Order 9835 in designating petitioners as "communist" organizations without notice and hearing is unconstitutional, but whether the district court's denial of a preliminary injunction is an abuse of discretion. Cf. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 317; *Alabama* v. *United States*, 279 U. S. 229, 231. We think it clear that the district court

properly exercised its discretion in the premises and that the judgments below are fully in accord with the mandate of this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

1. Petitioners concede that this Court did not hold in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* that the action of the Attorney General challenged herein is invalid for want of adequate notice or hearing (Pet., p. 8). Although the majority of the Court held that the district court had erred in dismissing the complaints for failure to state a claim upon which relief can be granted, only four justices expressed the view that the Due Process Clause of the Fifth Amendment required adequate notice and a hearing at some stage before the Attorney General's designations became final. The fifth member of the majority, Mr. Justice Burton, speaking for himself and Mr. Justice Douglas, found it unnecessary to reach that question.

On the pleadings then before the Court, Mr. Justice Burton stated that the issue was whether, in the face of the facts alleged in the complaints and therefore admitted by the motions to dismiss, the Attorney General was authorized by the Executive Order to include petitioners in the list of organizations designated by him as "communist". 341 U.S. at 124-125. Reading the Executive Order as containing no express or implied attempt to confer power upon anyone to act arbitrarily and

capriciously, he expressed the view that the Attorney General had exceeded his authority under the Executive Order in the light of the uncontradicted allegations in the complaints of the absence of any factual basis for the designations. 341 U.S. at 136-137. In conclusion, Mr. Justice Burton stated that "whether the complaining organizations are in fact communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await determination by the District Court upon remand." 341 U.S. at 141-142.

Upon remand to the district court, respondents put in issue by answers and affidavits the allegations of the complaints as to the absence of any factual basis for the Attorney General's designations. Refusing to pass upon petitioners' argument that the Attorney General's action could not be valid in the absence of notice and hearing regardless of the factual basis which he had for taking such action, the district court stated that it would not consider that question before "it has had opportunity to examine into the factual basis upon which the designations complained of were made" (R. 57).

Plainly, the district court's ruling that it would refrain from deciding constitutional issues unless absolutely necessary to a decision of the cases is fully in accord with this Court's mandate and with well established principles of constitutional adjudication. Should the district court find at the trial of the cases that the Attorney General possesses no information from which he could rea-

sonably have determined petitioners to be "communist" organizations, it would obviously be unnecessary for the district court to decide the constitutional questions petitioners raise.[5]

Petitioners' contention that the district court erred amounts to no more than the gratuitous assertion that respondents do not intend at any stage to introduce admissible evidence which would support the listing, that "there do not appear to be any issues at all which would be litigated at a trial" (Pet., p. 9). This suggestion, we submit, is wholly without foundation. Although, because of considerations of national security, respondents are unable to reveal all the information upon which the Attorney General acted, respondents are prepared to prove at the trial of the cases that the information which can be disclosed fully supports the action taken by the Attorney General.

Accordingly, petitioners' argument that the district court abused its discretion in denying a preliminary injunction is groundless. Petitioners concede that a preliminary injunction may be denied "where it appears that a trial might result in a judgment for defendant" (Pet., p. 9). As we have shown, there are issues of fact for trial, and, as the district court observed (R. 56), the facts alleged by respondents "if true, would undoubtedly

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[5] "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Alma Motor Co.* v. *Timken Co.*, 329 U.S. 129, 136-137; cf. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 571.

justify the conclusion which was reached" by the Attorney General.[6]

That the district court has not yet had an opportunity to inquire into the evidence demonstrates convincingly that no useful purpose would be served by the granting of certiorari at this time. In effect, petitioners are asking this Court to reconsider its prior decision and to pass upon constitutional questions which it declined to reach in advance of a determination whether petitioners are in fact "communist" organizations or whether the Attorney General possesses information from which he could reasonably find them so to be. We submit that, having failed to file a timely petition for rehearing, petitioners' present indirect attempt to obtain reconsideration comes too late.

2. Moreover, in view of the resignation of respondent McGranery on January 20, 1953, and the succession of Herbert Brownell, Jr., on January 21, 1953, to the office of Attorney General of the United States, the granting of certiorari at this time would be particularly inappropriate.[7] Under Rule 19(4) of the Rules of this Court, "a substitution of the successor in office may be effected only

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[6] Petitioners also contend that the district court erred in "balancing the equities" in favor of the overriding public interest (see *supra*, pp. 13-14, n. 2), but do not suggest that the conclusion reached by the district court is in conflict with any decision of this Court. To the contrary, the decisions of this Court fully support the action of the district court. Cf. *Yakus* v. *United States*, 321 U.S. 414, 440-441.

[7] Petitioners have not yet moved to substitute Attorney General Brownell as respondent in the place and stead of respondent McGranery.

where a satisfactory showing is made within six months after the death or separation from office." Such showing could be made in these cases only if Attorney General Brownell affirms and continues the actions of his predecessors and declines to afford petitioners a hearing. Since Attorney General Brownell has only recently assumed office, however, it is apparent that he has not yet had sufficient opportunity to consider the matter. It is equally apparent that any such determination on his part, affecting as it does the national security and the future of governmental procedures which have been in operation for some six years, is not one which can be made without thorough consideration.[8]

3. Finally, we think it pertinent to point out that petitioners' contention that expeditious treatment by this Court is required is at odds with petitioners' conduct in these proceedings. As shown above, pp. 3-4, 6-7, 13-15, petitioners have not pressed the prosecution of these cases. Upon remand to the district court, petitioners delayed some five months after the filing of respondents' answers before filing their motions for judgment on the pleadings and for a preliminary injunction. Petitioners did not file the instant petition for a writ of certiorari

[8] Respondent McGranery deliberated approximately five months before reaching the conclusion to affirm and continue the actions of his predecessors. See *supra*, p. 15. Compare also the action of District Judge Kirkland in granting Attorney General Brownell ninety days in which to decide whether he wishes to continue the current grand jury investigation of certain oil companies for alleged violation of the anti-trust laws. See The Washington Post, January 28, 1953, p. 13, col. 4.

before judgment until some six months after the entry of judgment by the district court. In this light, we submit that petitioners are hardly in a position to urge that these cases present the urgent and extraordinary circumstances which would justify the granting of certiorari at this time.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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